SAN FRANCISCO
Daily Journal
www.dailyjournal.com
FRIDAY, SEPTEMBER 23, 2011

Mediation evolved

By Zela "Zee" G. Claiborne

Business people and their attorneys recognize that mediation is a cost-effective, low risk process with a remarkably high success rate when conducted by an experienced mediator. As mediation has become increasingly popular over the last 20 years, the process has evolved in some important ways. But in order to take full advantage of mediation as a way to solve problems for clients, it is important to understand this evolution.

Back when mediators were trained in the process, they were taught to review the parties' briefs, begin the day with a joint session and then work with the parties in separate caucuses until resolution could be reached. Counsel was called upon to make opening statements during the joint session, which sometimes resembled arguments to a jury. The difference between mediation advocacy and litigation advocacy was not always clear.

What began as a standardized, cookie-cutter process has evolved into something that can be crafted to fit the needs of all participants with the goal of increasing the possibility of settlement.

What began as a standardized, cookie-cutter process has evolved into something that can be crafted to fit the needs of all participants with the goal of increasing the possibility of settlement.

The process may be different for each case. Some examples include:

The mediator may hold a phone conference in advance of the mediation in order to discuss obstacles to settlement and other concerns. Sometimes this call includes all counsel but, knowing that there are none of the usual concerns about ex parte communications in mediation, individual counsel often call the mediator to discuss these matters privately. The mediator then can confer with the other attorneys as well.

Counsel still submit briefs in order to present the other side with their client's point of view and educate the mediator on the background of the case, but may also submit a side letter for the mediator's eyes only in order to outline their concerns or offer confidential information.

The mediator may or may not have a joint session, depending on the personalities of the participants and the needs of the case. Some mediators will meet with each side separately at the beginning of the mediation to hear about their settlement goals as well as their suggestions about process. Then, based on experience with hundreds of cases and the suggestions of experienced counsel, the mediator can decide whether it would be productive to hold a full joint session, a short session just to introduce all participants and discuss the mediation process, or no joint session at all. A full-blown joint session in a very contentious case may be polarizing and therefore detrimental to the process. However, some face-to-face time with the other side may be a good thing. It's a way to understand the point of view and goals of the opposing party and move past the demonization that often happens when the parties have been engaged in aggressive and extensive discovery.

The caucus process has changed as well. While mediators used to move between the separate parties in caucus as the only communication link, now mediators often will meet with the parties separately and also with individuals in various combinations. For instance, the mediator may meet with some or all counsel or with the parties' key decision-makers without counsel. Meeting with decision-makers may be the key to reaching resolution late in the process and must be done with great care. It is important for mediators to respect the attorney-client relationship and obtain counsel's agreement before such a meeting. And, of course, no final settlement agreement can be reached in such a meeting until the parties have an opportunity for full discussion with their attorneys.

While counsel used to insist on documenting the settlement with a complete agreement in proper legalese at the end of the day, most are satisfied now to prepare a list of the deal points. This list can be signed by the parties as a legally binding document with the understanding that one attorney will prepare a final agreement shortly after the mediation. This process avoids arguments about minor issues late at night when everyone is tired from a long day of negotiation. Often the mediator is designated to be the arbitrator in the rare case that a dispute arises about the terms of the final settlement agreement.

Mediation in the hands of an experienced and skillful mediator has become even more popular over time and for good reason. Clients appreciate the fact that the process is confidential so that their business problems and intellectual property are shielded. They often are relieved to have an opportunity to cut litigation costs and get back to business. And, even more significantly, clients like the fact that they are the ones who make the final decisions about resolution of the dispute rather than turning that decision over to third-parties such as a judge, jury, or arbitrator.

While mediation has evolved over time, some things remain the same. To insure success of the mediation process and enhance your client's chances of obtaining the best possible settlement terms, it is important to prepare as carefully as if for a trial or arbitration. Exchange all important data and information in advance, especially accounting information regarding damages. Prepare a detailed brief concerning the law and significant facts aimed not just to educate the mediator but also to persuade and educate the other side about your client's views. Bring the right people to mediation, including all decision makers. Rely on the mediator for some evaluation of your case and for assistance with timing and amount of a demand or offer. Be willing to consider a range of settlement options, not just one specific dollar range. During skillfully handled mediation, all parties will learn more about the dispute and should be flexible enough to take a fresh look at solutions. Finally, adopt a respectful tone even in the face of major disagreements, since reaching a deal that all parties accept often involves a solution far better than could be achieved in trial.

Zela "Zee" G. Claiborne *is a mediator and arbitrator with JAMS. She specializes in business/commercial, intellectual property, construction, real estate and employment disputes. For more information, please contact case manager Derek Ryan at dryan@jamsadr.com.*